

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.

BURLINGTON NORTHERN, INC. and     )  
BURLINGTON NORTHERN RAILROAD     )  
COMPANY - CONTROL AND MERGER -     ) FINANCE DOCKET  
SANTA FE PACIFIC CORPORATION     ) NO. 32549 (Sub-No. 22)  
and THE ATCHISON, TOPEKA and     )  
SANTA FE RAILWAY COMPANY     )

RESPONSE OF THE UNITED STATES DEPARTMENT OF JUSTICE  
TO PETITION OF ROQUETTE AMERICA, INC. TO REOPEN  
FINANCE DOCKET NO. 32549

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Pursuant to 49 C.F.R. § 1115.4, Roquette America, Inc. (RAI) submitted to the Surface Transportation Board (Board) on February 15, 2000 a Petition To Reopen Decision No. 38 in Finance Docket No. 32549. RAI seeks to replace a condition ordered by the Interstate Commerce Commission (ICC) in the proceeding to remedy the loss of Class I rail carrier competition in Keokuk, Iowa resulting from the merger of the railroad systems of the Burlington Northern, Inc.(BN)and the

Atchison, Topeka and Santa Fe Railway Co.(SF) into the Burlington Northern Santa Fe Railroad (BNSF). RAI's Petition asserts that no such competitive rail service to Keokuk exists today and that changed circumstances justify reopening of the BNSF merger proceeding for the limited purpose of addressing this issue.

The United States Department of Justice (the Department) hereby submits its response to the Petition supporting the reopening of the proceeding to examine whether Board action is needed to preserve for shippers in the Keokuk area the competition that existed for them prior to the BNSF merger.

#### PRE-MERGER COMPETITION IN SOUTHEAST IOWA

The Department participated in the captioned proceeding before the ICC and addressed, through filings and oral argument, the competitive issues that were raised by the prospective merger of the BN and the SF. Among the competitive issues identified by the Department was the likely effect on shippers in and out of Keokuk and Fort Madison, Iowa should the ICC approve an unconditioned merger of these two carriers.

As Dr. Peter Woodward, the Department's expert,

testified,<sup>1</sup> the BN and SF were then the two major railroads that served the southeast corner of Iowa where Fort Madison and Keokuk are located. Attached hereto as Exhibit A is the map provided with Dr. Woodward's testimony, showing the railroad lines around these cities as they existed then. As the map shows, BN served the area with a line running north from West Quincy, MO through Keokuk and Fort Madison, which joined the main BN line through Iowa at Burlington. The SF main Chicago-Los Angeles line served Fort Madison. Customers in Keokuk were served by SF through an agreement with the Keokuk Junction Railway (KJ). The only other railroad within 30 miles was the Toledo, Peoria and Western (TPW), a short line railroad that connected with the SF at Lomax, IL, northeast of Keokuk, and ran from there east through Peoria, IL to Logansport, IN.

Dr. Woodward testified that an unconditioned BN/SF merger was likely to result in increased transportation rates for shippers of all products reliant on rail transportation both in and out of Fort Madison and Keokuk. RAI, which produces a number of products made from corn, was one such shipper. Dr. Woodward testified that corn syrup was shipped out of both

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<sup>1</sup> Dr. Woodward testified regarding areas of competitive concern in testimony filed on May 10, 1995. DOJ-2.

cities by rail in tank cars, primarily westbound to Texas and California. Shipping by truck for the whole move, or by truck to another railroad, would be much more expensive than a rail movement. Information compiled by Dr. Woodward for his testimony led him to conclude that competition between BN and SF had resulted in lower rail rates. Following the merger, he predicted that westbound traffic out of Keokuk would suffer most from the loss of pre-merger competition between BN and SF.

#### THE BUSHNELL CONDITION

In the course of the control proceeding the merging carriers reached a number of agreements with other parties -- both shippers and carriers. A major settlement agreement, struck by the merging parties with the Southern Pacific Railroad (SP) and the National Industrial Traffic League (NITL), addressed the situation in southeast Iowa faced by shippers in Keokuk and Fort Madison. To remedy the loss of competition faced by those shippers, the NITL agreement stipulated that the SP, which already operated over the BN line from Kansas City, MO to Chicago through Bushnell, IL<sup>2</sup>, would receive the right to serve any customer on the BN or SF

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<sup>2</sup> As shown on Exhibit A, Bushnell is located between West Quincy, MO and Galesburg, IL.

within the Fort Madison and Galesburg, IL switching limits. The SP also received the right to interchange traffic with the TPW at Bushnell (the "Bushnell condition"). Dr. Woodward testified<sup>3</sup> that the merging parties' agreements with the SP would create an independent alternative to BN for shippers of both westbound and eastbound traffic in and out of Keokuk.<sup>4</sup>

The ICC subsequently adopted the relief set out in the NITL settlement agreement that purported to resolve the Iowa competition issues and made that agreed-upon relief a condition of its approval of the transaction.<sup>5</sup>

RAI's Petition to Reopen asserts that the Bushnell condition has not been the effective remedy for the loss of competition at Keokuk that the ICC intended. Subsequent events -- the assumption of control of the SP by the Union Pacific (UP) and the rerouting of traffic by UP to lines other than the Chicago to West Quincy line -- have intervened to eliminate the competitive alternative meant to be created by the ICC-imposed

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<sup>3</sup> Dr. Woodward testified on issues of relief in testimony filed with the ICC on June 9, 1995. DOJ-3.

<sup>4</sup> Dr. Woodward's conclusion that granting SP rights to interchange traffic at Bushnell would provide adequate relief was based upon the interchange being operationally feasible. DOJ-3 at 13.

<sup>5</sup> 10 I.C.C. 2d 661 (1995) at 761-765, 803.

condition.<sup>6</sup> As the RAI Petition points out, these events, which were outside of its control, have resulted in its being captive to BNSF -- a result not contemplated by the ICC when it issued its Decision approving the transaction.

THE BOARD HAS THE POWER TO ACT TO RESTORE COMPETITION

Section 1115.4 of the Code of Federal Regulations provides the basis for reopening any administratively final action, where as here, the petitioner does not seek to appeal an entire action. As the Board has recently made clear, it will impose relief "as necessary to ensure that our conditions work as intended." Dec. No. 125, in CSX Corp. -- Control and Operating Leases/Agreements -- Conrail, Inc., Fin. Dkt. No. 33388 (served May 20, 1999) at 11 (questions were raised about the operational feasibility of board-mandated conditions in that proceeding).

CONCLUSION

The information presented in RAI's Verified Petition to Reopen raises serious questions about the continuing efficacy of the Bushnell condition, deemed at the time of Decision No. 38 by the merging parties, shippers and the Department to be an appropriate remedy for the loss of competition at Keokuk.

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<sup>6</sup> RAI also asserts that efforts to work with UPSP on alternative routings have also failed to provide RAI with rail service comparable to its pre-merger levels. Williams V.S. at 7-9.

The Department accordingly supports RAI's Petition to Reopen to determine whether Board action is needed to restore the competition lost by the BNSF merger.

Respectfully submitted,

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